

1-1-1992

## The Rehnquist Court and the New Establishment Clause

Russell M. Mortyn

Follow this and additional works at: [https://repository.uchastings.edu/hastings\\_constitutional\\_law\\_quaterly](https://repository.uchastings.edu/hastings_constitutional_law_quaterly)



Part of the [Constitutional Law Commons](#)

---

### Recommended Citation

Russell M. Mortyn, *The Rehnquist Court and the New Establishment Clause*, 19 HASTINGS CONST. L.Q. 567 (1992).  
Available at: [https://repository.uchastings.edu/hastings\\_constitutional\\_law\\_quaterly/vol19/iss2/7](https://repository.uchastings.edu/hastings_constitutional_law_quaterly/vol19/iss2/7)

This Note is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Constitutional Law Quarterly by an authorized editor of UC Hastings Scholarship Repository. For more information, please contact [wangangela@uchastings.edu](mailto:wangangela@uchastings.edu).

# The Rehnquist Court and the New Establishment Clause

By RUSSELL M. MORTYN\*

The prescriptions in favor of liberty ought to be leveled against that quarter where the greatest danger lies, namely, that which possesses the highest prerogative of power. But this is not found in either the Executive or Legislative departments of government but in the body of the people, operating by the majority against the minority . . . .<sup>1</sup>

— James Madison

## Introduction

When Chief Justice William Rehnquist was nominated to the Supreme Court, he told the members of the Senate Judiciary Committee that the standard by which they ought to measure a nominee is "fidelity to the Constitution and let the chips fall where they may . . . ."<sup>2</sup> Rehnquist repeatedly referred to the original intent of the Framers as a gauge by which to measure a judge's "fidelity to the Constitution."<sup>3</sup> Rehnquist believes that the Framers intended to leave value judgments to the Legislature.<sup>4</sup> Thus, Rehnquist firmly stated his view that judges should not read their own personal values into the Constitution:

I subscribe unreservedly to that philosophy, that when you put on the robe, you are not there to enforce your own notions as to what is desirable public policy. You are there to construe as objectively as you possibly can the Constitution of the United States, the statutes of Congress, and whatever relevant legal materials there may

---

\* Member, Third Year Class; B.A., University of California, Santa Cruz, 1986. The author thanks Professor Robert S. Alley of the University of Richmond for his generous assistance.

1. 1 ANNALS OF CONG. 437 (Joseph Gales ed., 1789), *quoted in* William J. Brennan Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 437 (1986).

2. *Nominations of William H. Rehnquist and Lewis F. Powell, Jr.: Hearings Before the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 156 (1971) [hereinafter *Nomination Hearings*].

3. *See, e.g., id.* at 18-19, 55, 81-82, 138, 167-69.

4. *Id.* at 82; *see also* William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).

be in the case before you.<sup>5</sup>

Despite his proclamations, both Rehnquist and the Court under his leadership are frequently criticized as "activist."<sup>6</sup> Some scholars suggest that Rehnquist uses "original intent," particularly in his interpretation of the Establishment Clause,<sup>7</sup> as a "false god" to justify his personal political agenda.<sup>8</sup> The Rehnquist Court has the opportunity to answer its critics with its forthcoming decision in *Lee v. Weisman*.<sup>9</sup>

*Weisman*, a school prayer case, presents the Court with the current legal debate over the meaning of the Establishment Clause. Commentators generally classify the competing positions of this debate as "accommodationist" and "separationist."<sup>10</sup> Accommodationists argue that the Establishment Clause allows some government support of religion,<sup>11</sup> while separationists maintain that the Establishment Clause prohibits any government aid to religion.<sup>12</sup> Since the Court first interpreted the Establishment Clause forty-five years ago in *Everson v. Board of Education*,<sup>13</sup> it has maintained a separationist viewpoint.<sup>14</sup> *Lee v. Weisman* challenges this longstanding separationist perspective.<sup>15</sup>

The Court's separationist interpretation of the Establishment Clause is largely understood to require a secular state.<sup>16</sup> As a result, opponents

5. *Nomination Hearings*, *supra* note 2, at 156.

6. See, e.g., DONALD E. BOLES, MR. JUSTICE REHNQUIST, JUDICIAL ACTIVIST (1987); ROBERT H. BORK, THE TEMPTING OF AMERICA 101-28 (1990); Owen Fiss & Charles Krauthammer, *A Return to the Antebellum Constitution: The Rehnquist Court*, NEW REPUBLIC, Mar. 10, 1982, at 14; *The Loud Majority*, ECONOMIST, July 6, 1991, at 15.

7. The Establishment Clause mandates that "Congress shall make no law respecting an establishment of religion . . ." U.S. CONST. amend. I.

8. William P. Marshall, *Unprecedented Analysis and Original Intent*, 27 WM. & MARY L. REV. 925 (1986) (citing Philip B. Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 WM. & MARY L. REV. 839 (1986); Douglas Laycock, "Nonpreferential" Aid to Religion: A False Claim About Original Intent, 27 WM. & MARY L. REV. 875 (1986)).

9. No. 90-1014 (U.S. argued Nov. 6, 1991).

10. See, e.g., RICHARD E. MORGAN, THE POLITICS OF RELIGIOUS CONFLICT: CHURCH AND STATE IN AMERICA 49-68 (2d ed. 1980); Robert L. Cord & Howard Ball, *The Separation of Church and State: A Debate*, 1987 UTAH L. REV. 895, 920.

11. DEREK DAVIS, ORIGINAL INTENT 48-49 (1991).

12. *Id.* at 48.

13. 330 U.S. 1 (1947).

14. ROBERT L. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION at xiii (1982).

15. See Brief for the Petitioners at 14-35, *Lee v. Weisman*, No. 90-1014 (U.S. argued Nov. 6, 1991) (arguing for coercion as a required element of an Establishment Clause violation); Respondent's Brief at 8, *Weisman*, No. 90-1014 ("Petitioners . . . have seized upon this case as a vehicle to ask the Court to overturn more than four decades of well-settled law . . . [P]etitioners' attack is focused more on this Court's Establishment Clause jurisprudence than [on] the decision below."); see also Brief for the United States as Amicus Curiae Supporting Petitioners *passim*, *Weisman*, No. 90-1014 (asking the Court to overturn *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the distillation of the Court's separationist jurisprudence).

16. See Steven D. Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955, 979-80 (1989). Professor Smith provides an extensive

of a secular state reject separationism in favor of accomodationism.<sup>17</sup> As Chief Justice Rehnquist has criticized the Court's separationist jurisprudence in favor of a more accomodationist stance, he has come to be viewed as the "champion of religion."<sup>18</sup>

Professor Steven Smith describes the coalition of interests represented by the separationist view: "One group, typically composed of liberals, secularists, and members of vulnerable religious groups, argues that religious involvement in government is bad for society. The other, composed of traditional Lutherans and evangelical Protestants, argues that religious involvement in government is bad for religion."<sup>19</sup>

Chief Justice Rehnquist has been instrumental in prodding the Court away from its traditional separationist stance, toward a more accomodationist interpretation of the Establishment Clause.<sup>20</sup> The *Weisman* case implicates the judicial philosophy that Rehnquist espoused in his Senate nomination hearings.<sup>21</sup>

---

historical analysis of the traditions and thought that led to the Establishment Clause. He contends that the secularist construction is wrong. *Id. passim*. He maintains that the Framers of the Establishment Clause derived a narrow concept of separationism from John Locke. *Id.* at 959-71. Under this conception, "government was not to pursue spiritual ends. But insofar as religious belief or practice affected civil interests, religion fell within the domain of proper governmental concerns." *Id.* at 970 (footnotes omitted).

17. *Id.* at 980.

18. DAVIS, *supra* note 11, at 127. Mr. Davis identifies "[p]rivate school and Christian school advocates" in particular, as holding this view. *Id.* at 128 n.68.

He asserts, however, that the perception of Rehnquist as the "champion of religion" is ill-conceived. *Id.* He argues that Rehnquist is an accomodationist "only to the extent that the various legislatures choose to exercise their prerogative to accomodate religion." *Id.* at 127.

Further, Davis suggests that Rehnquist's "nonpreferentialist" interpretation of the Establishment Clause (discussed *infra* Part III) is "more reasoned than principled." *Id.* at 93. Davis presents a compelling argument that Rehnquist is using the nonpreferentialist position as a substitute for his more sincerely held view that the First Amendment was not intended to govern the states. *Id.* at 91-94. According to Davis, since it is no longer feasible to overturn the "incorporation" of the First Amendment to the states, Rehnquist "is likely to be more successful by arguing for an application to the states of the same kinds of restrictions on religion that [Rehnquist argues] were contemplated by the [F]ramers with respect to the national government." *Id.* at 93.

19. Smith, *supra* note 16, at 988 n.175 (citing Michael E. Smith, *Religious Activism: The Historical Record*, 27 WM. & MARY L. REV. 1087, 1093 (1986)). The religious objections to establishment are reflected in the questions of one commentator:

What is the result of all this display of holy things in public places? Does it make the market-place more holy? Does it improve people? Does it change their character or motives? On the contrary, the sacred symbols are thereby cheapened and degraded. The effect is often that of a television commercial on a captive audience—boredom and resentment.

Dean M. Kelley, *Beyond Separation of Church and State*, 5 J. CHURCH & STATE 181, 190-91 (1963).

20. See *infra* Parts II and III.

21. See *supra* notes 2-5 and accompanying text.

This Note traces Rehnquist's interpretation of the Establishment Clause. Part I of the Note describes the background of the Court's separationist jurisprudence. Part II reviews Rehnquist's opinions prior to the pivotal *Wallace v. Jaffree*<sup>22</sup> case. Part III describes the accommodationist position that Justice Rehnquist articulated in *Jaffree*.<sup>23</sup> Part IV presents some criticism of this position. Part V examines the rise of an alternative interpretation of the Establishment Clause, proposed by Justice O'Connor, which articulates an intermediate position between the accommodationist and separationist views. Part VI outlines the arguments before the Court in *Lee v. Weisman*. This Note concludes that the Court should adopt Justice O'Connor's position as a workable compromise, and apply this interpretation to the *Weisman* case.

## I. Background

### A. *Everson v. Board of Education*

The Establishment Clause of the First Amendment mandates that "Congress shall make no law respecting an establishment of religion . . . ."<sup>24</sup> The Court first addressed the meaning of this language in *Everson v. Board of Education*,<sup>25</sup> which upheld a school district's use of tax revenues to reimburse parents for bus fares used to transport their children to parochial schools.

Justice Hugo Black wrote the opinion of the Court. Black began his Establishment Clause analysis by reviewing the historical environment in which the First Amendment was written.<sup>26</sup> He described the strife and persecution that prevailed in the colonies:

The very charters granted by the English Crown . . . authorized . . . religious establishments which all, whether believers or non-believers, would be required to support and attend. . . . Catholics found themselves hounded and proscribed because of their faith; Quakers who followed their conscience went to jail; Baptists were particularly obnoxious to certain dominant Protestant sects; men and women of varied faiths who happened to be in a minority in a particular locality were persecuted because they steadfastly persisted in worshipping God only as their own consciences dictated. And all of these dissenters were compelled to pay tithes and taxes to support government-sponsored churches whose ministers preached inflammatory sermons designed to strengthen and consolidate the established faith by generating a burning hatred against dissenters.<sup>27</sup>

---

22. 472 U.S. 38 (1985).

23. *Id.* at 91-114 (Rehnquist, J., dissenting).

24. U.S. CONST. amend. I.

25. 330 U.S. 1 (1947).

26. *Id.* at 8.

27. *Id.* at 9-10 (citations omitted).

Black ascribed the Establishment Clause to the colonials' abhorrence of these practices.<sup>28</sup>

Justice Black cited Virginia as "a great stimulus and able leader[ ]" in the movement toward religious liberty.<sup>29</sup> In particular, he cited Virginia's struggle in 1785 and 1786, when the Virginia legislature was set to renew a tax levy for the established church.<sup>30</sup> James Madison's *Memorial and Remonstrance Against Religious Assessments* was instrumental in defeating the proposed tax.<sup>31</sup> Not only did the *Remonstrance* succeed in defeating the tax levy, but it also induced the Virginia legislature to pass the "Bill for Establishing Religious Freedom," which was written by Thomas Jefferson.<sup>32</sup>

---

28. *Id.* at 11.

29. *Id.*

30. *Id.*

31. *Id.* at 12. The *Memorial and Remonstrance Against Religious Assessments* is reproduced in JAMES MADISON ON RELIGIOUS LIBERTY 55 (Robert Alley ed., 1985), and as an appendix to *Everson*, 330 U.S. at 63-72. It is hereinafter referred to as the *Remonstrance*.

The *Remonstrance* presented 15 distinct and cumulative arguments against the tax. Professor Van Patten paraphrases Madison's arguments as follows:

1. Religion is outside the jurisdiction of civil society.
2. There is no legislative power with respect to the retained rights of the people.
3. Even the smallest infringement of religious liberty poses a danger.
4. The bill violates the principle of equality.
5. The civil magistrate is not competent to judge religious truth.
6. Establishment of religion is contrary to the principles of Christianity.
7. The experience of establishment has been disastrous.
8. Establishment is not necessary for the support of Civil Society.
9. Establishment departs from America's image as an asylum from religious oppression.
10. The bill would encourage emigration.
11. Establishment destroys political moderation.
12. Establishment is counterproductive to the spread of Christian religion.
13. Establishment of religion will weaken respect for the law.
14. It is not clear that the assessment bill is favored by a majority.
15. The assessment bill is violative of the Virginia Declaration of Rights.

Jonathan K. Van Patten, *In the End is the Beginning: An Inquiry into the Meaning of the Religion Clauses*, 27 ST. LOUIS U. L.J. 1, 51-59 (1983).

Madison stated that "[t]he Religion . . . of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate." *Remonstrance*, *supra*, reprinted in *Everson*, 330 U.S. at 64 app. The proposed tax would "degrade[ ] from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority." *Id.*, reprinted in 330 U.S. at 69. Furthermore, Madison's objections were based upon principle. "[T]he same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment[ ] may force him to conform to any other establishment in all cases whatsoever . . ." *Id.*, reprinted in 330 U.S. at 65-66. The role of the *Remonstrance* in leading to the First Amendment is discussed *infra* Part IV.B.2.

32. *Everson*, 330 U.S. at 12 (*Everson* refers to this bill as the "Virginia Bill for Religious Liberty"). The bill is reproduced as an appendix to DAVIS, *supra* note 11, at 171. The role of the bill in leading to the First Amendment is discussed *infra* Part IV.B.2.

The preamble to Jefferson's bill states that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical . . ."<sup>33</sup> The body of the statute mandates that "no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief . . ."<sup>34</sup> Black cited previous Supreme Court decisions for the proposition that the First Amendment was intended to afford the same protections as the Virginia statute.<sup>35</sup>

Black concluded that the bus fare reimbursement program was religion-neutral, and did not constitute "support" for the parochial schools.<sup>36</sup> Therefore, the program was constitutional.<sup>37</sup> Nevertheless, *Everson* set forth this separationist interpretation of the Establishment Clause: "Neither a state nor the Federal Government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another."<sup>38</sup>

## B. *Lemon v. Kurtzman*

Twenty-four years later, then-Chief Justice Burger articulated what is now the established framework for Establishment Clause analysis. In *Lemon v. Kurtzman*,<sup>39</sup> the Court examined two state statutes that provided funds for church-affiliated schools, but prohibited the use of those funds for religious instruction. The Court held both statutes to be unconstitutional.<sup>40</sup>

*Lemon* fashioned a three-part test to determine whether a statute violates the Establishment Clause: (1) the statute must have a secular legislative purpose; (2) the statute must not have the primary effect of advancing or inhibiting religion; and (3) the statute must not foster excessive governmental entanglement with religion.<sup>41</sup>

This test was "gleaned" from the Court's earlier decisions.<sup>42</sup> The Court took the "purpose" and "effect" prongs of the test from *Board of*

---

33. *Everson*, 330 U.S. at 13 (quoting the Virginia Bill for Religious Liberty).

34. *Id.* (citing 12 WILLIAM HENING, STATUTES OF VIRGINIA 84 (1823)).

35. 330 U.S. at 13. *But see* *Wallace v. Jaffree*, 472 U.S. 38, 98-99 (1985) (Rehnquist, J., dissenting) (arguing that *Everson* attributed too much significance to this statute); *infra* Part III.

36. *Everson*, 330 U.S. at 18.

37. *Id.*

38. *Id.* at 15.

39. 403 U.S. 602 (1971).

40. *Id.* at 607.

41. *Id.* at 612-13.

42. *Id.* at 612.

*Education v. Allen*,<sup>43</sup> and the "entanglement" prong from *Walz v. Tax Commission*.<sup>44</sup> *Allen* derived the "purpose" and "effect" analyses from *Everson*.<sup>45</sup> *Walz* formulated the "entanglement" inquiry from a broad historical survey of the relationship between taxation and religious property.<sup>46</sup> Thus, the *Lemon* test is a distillation of the Court's separationist jurisprudence.

## II. Rehnquist's Formative Decisions

Rehnquist indicated early in his tenure that he was dissatisfied with the *Lemon* test. When Justice Powell wrote for the majority in *Hunt v. McNair*,<sup>47</sup> he described the three prongs of *Lemon* as "no more than helpful signposts." Rehnquist joined in this opinion.

Ten years later, Rehnquist wrote for the Court in *Mueller v. Allen*.<sup>48</sup> *Mueller* held that a state statute that allowed tax deductions for expenses incurred in sending children to parochial schools did not violate the Establishment Clause. Although Rehnquist applied the *Lemon* test, he called its precedential value into question.<sup>49</sup> Citing *Hunt*, he referred to *Lemon* as "no more than a helpful signpost."<sup>50</sup> Rehnquist ultimately applied the *Lemon* factors in *Mueller*, but he treated them as conveniences, rather than as the constitutional requirements that they had been for the past decade.<sup>51</sup>

A week after *Mueller*, the Court decided an Establishment Clause case, *Marsh v. Chambers*,<sup>52</sup> without using the *Lemon* test.<sup>53</sup> *Marsh* upheld the constitutionality of prayers at legislative sessions. Chief Justice

---

43. 392 U.S. 236 (1968). *Allen* upheld a New York statute that required public schools to lend textbooks to parochial schools free of charge. Black dissented, arguing that the New York law was a "stride in [the] direction" of an established state religion. *Id.* at 251 (Black, J., dissenting). "[I]t nearly always is by insidious approaches that the citadels of liberty are most successfully attacked." *Id.* at 251-52 (Black, J., dissenting).

Although the majority purported to follow *Everson*, Black distinguished the loan of textbooks from the transportation fees upheld in *Everson*. In Black's view, the textbooks more directly aided the "propagation of sectarian religious viewpoints." *Id.* at 253 (Black, J., dissenting).

44. 397 U.S. 664 (1970). Burger wrote for the Court in *Walz*, holding that property tax exemptions for religious organizations did not violate the Establishment Clause. *Id.* at 680.

45. *Allen*, 392 U.S. at 243.

46. *Walz*, 397 U.S. at 671-74.

47. 413 U.S. 734, 741 (1973).

48. 463 U.S. 388 (1983).

49. See Robert L. Cord, *Church-State Separation: Restoring the "No Preference" Doctrine of the First Amendment*, 9 HARV. J.L. & PUB. POL'Y 129, 164-65 (1986) (referring to Rehnquist's characterization of *Lemon* as a "status reduction").

50. *Mueller*, 463 U.S. at 394.

51. See, e.g., *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 123 (1982); *Widmar v. Vincent*, 454 U.S. 263, 271 (1981); *Wolman v. Walter*, 433 U.S. 229, 236 (1977); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 772-73 (1973).

52. 463 U.S. 783 (1983).



Burger, the author of the *Lemon* decision, also wrote for the majority in *Marsh*. In holding the contemporary prayers constitutional, he purported to extrapolate the intent of the Framers from their actions.<sup>54</sup> *Marsh* did not apply the *Lemon* factors because of the "unique history" surrounding legislative prayers.<sup>55</sup> The members of the First Congress voted to appoint and pay a chaplain for each House the same week they approved the draft of the First Amendment that was submitted to the states.<sup>56</sup> Rehnquist joined in Burger's opinion.

### III. Rehnquist's Nonpreferentialist Position

Rehnquist most forcefully expressed his antipathy toward the *Lemon* test in his dissent to *Wallace v. Jaffree*.<sup>57</sup> *Jaffree* struck down an Alabama statute which authorized a daily period of silence in public schools for "meditation or voluntary prayer."<sup>58</sup>

Whereas Justice Black, in *Everson*, had read the Establishment Clause as prohibiting any government aid to religion,<sup>59</sup> Rehnquist asserted that the Establishment Clause prohibited only a national church and a governmental preference for one religious denomination or sect over another.<sup>60</sup> Under the Rehnquist view, the government is not prohibited from aiding religion in general.

Rehnquist asserted that *Everson* was erroneous as a matter of history.<sup>61</sup> Under Rehnquist's analysis,<sup>62</sup> the "wall" metaphor, which epitomizes the separationist position, attaches too much significance to Thomas Jefferson's views on church-state relations.<sup>63</sup> Rehnquist suggested that Jefferson's views should be discounted because Jefferson was out of the country when the Bill of Rights was passed by Congress and

---

53. *Lemon's* survival after *Marsh* was probably due in large part to Justice Brennan's dissent. Brennan portrayed the holding in *Marsh* as an aberration. *Marsh*, 463 U.S. at 796 (Brennan, J., dissenting). Professor Cord characterizes Brennan's dissent as a "masterful display of damage control." Cord, *supra* note 49, at 166.

54. *Marsh*, 463 U.S. at 790.

55. *Id.* at 790-91.

56. *Id.* at 790.

57. 472 U.S. 38, 91-114 (1985) (Rehnquist, J., dissenting).

58. *Id.* at 61.

59. See *supra* Part I.A.; "Neither a state nor the Federal Government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another." *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947) (emphasis added).

60. *Jaffree*, 472 U.S. at 113 (Rehnquist, J., dissenting).

61. *Id.* at 91-107.

62. *Id.* at 92.

63. The metaphor was first phrased by Jefferson in an 1802 letter to the Danbury Baptist Association. Jefferson stated: "I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between church and State." *Id.* at 92 (quoting 8 WRITINGS OF THOMAS JEFFERSON 113 (H. Washington ed., 1861)).

ratified by the states.<sup>64</sup>

On the other hand, Rehnquist recognized that James Madison played "as large a part as anyone in the drafting of the Bill of Rights."<sup>65</sup> According to Rehnquist, Madison "saw the [First] Amendment as designed to prohibit the establishment of a national religion, and perhaps to prevent discrimination among sects. He did not see it as requiring neutrality on the part of government between religion and irreligion."<sup>66</sup> Based upon this reading of history, Justice Rehnquist concluded that the Establishment Clause, as understood by the Framers, was "not concerned about whether the Government might aid all religions evenhandedly."<sup>67</sup> This interpretation has come to be termed the "nonpreferentialist" view.<sup>68</sup>

Rehnquist limited his historical analysis to an examination of the proceedings of the First Congress.<sup>69</sup> The records of these proceedings, however, are sparse. The House and Senate originally adopted different versions of the Religion Amendment.<sup>70</sup> There is a brief record of the House debates, but the Senate debates were kept secret.<sup>71</sup> The language that was finally adopted as a part of the First Amendment emerged from a House conference committee.<sup>72</sup> Debate on the compromise version was negligible.<sup>73</sup>

Rehnquist concluded, on the basis of the House proceedings, that Madison "was undoubtedly the most important architect among the Members of the House" of the Establishment Clause.<sup>74</sup> Rehnquist argued, however, that Madison spoke "as an advocate of . . . legislative compromise, not as an advocate of incorporating the Virginia Statute of Religious Liberty into the United States Constitution."<sup>75</sup>

---

64. *Id.*

65. *Id.*

66. *Id.* at 98.

67. *Id.* at 99. Commentators are divided along the same lines as Black and Rehnquist. For authority supporting Rehnquist's position as to the Framers' intent, see CORD, *supra* note 14, at ii, 5-15; MICHAEL J. MALBIN, RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT 9 (1978); RODNEY K. SMITH, PUBLIC PRAYER AND THE CONSTITUTION 73-105 (1987); Cord, *supra* note 49. For authority refuting this position, see LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 91-119 (1986); LEONARD W. LEVY, *No Establishment of Religion: The Original Understanding*, in JUDGMENTS: ESSAYS ON AMERICAN CONSTITUTIONAL HISTORY 169, 170-79 (1972); Laycock, *supra* note 8; THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 207-10 (1986).

68. See, e.g., DAVIS, *supra* note 11, at 48; Smith, *supra* note 16, at 981 n.136.

69. *Jaffree*, 472 U.S. at 92-98 (Rehnquist, J., dissenting).

70. *Id.* at 97.

71. *Id.*

72. *Id.*

73. *Id.* at 93-97.

74. *Id.* at 97-98.

75. *Id.* at 98.

Madison originally submitted this language to the House: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed."<sup>76</sup> This language was then referred to a Select Committee, which consisted of Madison and ten others.<sup>77</sup> The Committee revised the language to read: "[N]o religion shall be established by law, nor shall the equal rights of conscience be infringed."<sup>78</sup>

Madison spoke to the House in support of the revised language, saying that it meant "that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience."<sup>79</sup>

Representative Benjamin Huntington objected that the language might be taken to be "hurtful to the cause of religion."<sup>80</sup> Madison responded that the insertion of the word "national" before the word "religion" would remedy this objection.<sup>81</sup>

In support of his assertion that Madison did not intend a "wall of separation" between church and state, Rehnquist relied on Madison's originally proposed language, his explanation to the House of its meaning, and his response to Representative Huntington.<sup>82</sup>

Rehnquist condemned the *Lemon* test on the basis of this historical analysis. He declared that the "purpose" and "effect" prongs of *Lemon* were faulty because they were based upon *Everson*'s allegedly erroneous history.<sup>83</sup> He added that the "entanglement" prong, which the *Lemon* Court gleaned from *Walz v. Tax Commission*,<sup>84</sup> was limited to *Walz*'s facts.<sup>85</sup> Thus, the *Lemon* test, according to Rehnquist, "has no more grounding in the history of the First Amendment than does the wall theory upon which it rests."<sup>86</sup>

The other Justices were not convinced, however. The Court utilized the *Lemon* test twice in the same year that *Jaffree* was decided. Both times, the Court upheld programs which allowed public school teachers to teach at religious schools.<sup>87</sup> Rehnquist dissented in both of those

---

76. *Id.* at 94 (quoting 1 ANNALS OF CONG. 434 (Joseph Gales ed., 1789)).

77. *Id.* at 95.

78. *Id.* (quoting 1 ANNALS OF CONG. 434 (Joseph Gales ed., 1789)).

79. *Id.* (quoting 1 ANNALS OF CONG. 730 (Joseph Gales ed., 1789)).

80. *Id.* at 96 (quoting 1 ANNALS OF CONG. 730-31 (Joseph Gales ed., 1789)).

81. *Id.*

82. *Id.* at 98.

83. *Id.* at 108.

84. 397 U.S. 664 (1970). See *supra* text accompanying note 42.

85. *Jaffree*, 472 U.S. at 109 (Rehnquist, J., dissenting).

86. *Id.* at 110.

87. *Aguilar v. Felton*, 473 U.S. 402 (1985); *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985).

cases, citing his *Jaffree* dissent.<sup>88</sup>

#### IV. Criticism of the Nonpreferentialist Position

##### A. "Original Intent" as a Method of Interpreting the Establishment Clause

When he articulated his nonpreferentialist interpretation of the Establishment Clause, Chief Justice Rehnquist purported to implement the original intent of the Framers, as expressed in the text of the First Amendment and the corresponding legislative history. The Framers' intent, however, reflects the conditions that prevailed at the time of the drafting of the Bill of Rights.

In contrast to Rehnquist, Justice Brennan views the Constitution as a "transformative" document.<sup>89</sup> In his words: "Our Constitution was not intended to preserve a preexisting society but to make a new one, to put in place new principles that the prior political community had not sufficiently recognized."<sup>90</sup> In Brennan's view, Supreme Court Justices must "read the Constitution in the only way that [they] can: as twentieth-century Americans. [They must] look to the history of the time of framing and to the intervening history of interpretation."<sup>91</sup>

Brennan vehemently rejects the "original intent" doctrine.<sup>92</sup> He argues that "the Framers themselves did not agree about the application or meaning of particular constitutional provisions and hid their differences in cloaks of generality."<sup>93</sup> For this reason, the way in which the Framers intended constitutional principles to apply to specific questions is indiscernable.<sup>94</sup> Thus, the "original intent" doctrine creates "a presumption of resolving textual ambiguities against the claim of constitutional right."<sup>95</sup>

Brennan asserts that this presumption "is a choice no less political than any other [because] it expresses antipathy to claims of the minority to rights against the majority."<sup>96</sup> He argues that this presumption was not intended,<sup>97</sup> and that it is inconsistent with the Constitution's

---

88. *Aguilar*, 473 U.S. at 420-21 (Rehnquist, J., dissenting); *Ball*, 473 U.S. at 400-01 (Rehnquist, J., dissenting).

89. Brennan, *supra* note 1, at 438.

90. *Id.*

91. *Id.*

92. *Id.* at 435-38.

93. *Id.* at 435.

94. *Id.*

95. *Id.* at 436.

96. *Id.*

97. *Id.* at 438 ("Our Constitution was . . . intended . . . to put in place new principles that the prior political community had not sufficiently recognized. . . . [The Framers] had no desire to enshrine the status quo."); see also H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985). Madison himself expressed his view that "original

purpose.<sup>98</sup>

Brennan reiterated in *Marsh v. Chambers* that "the Constitution is not a static document whose meaning on every detail is fixed for all time by the life experience of the Framers."<sup>99</sup> To support his position, Brennan listed numerous practices that were acceptable in 1789, but that would be unconstitutional today.<sup>100</sup>

Brennan identified the Establishment Clause as a provision particularly ill-suited to interpretation according to eighteenth-century conditions, because we are now "vastly more diverse" in our religious views than were the Framers.<sup>101</sup> Brennan stated: "In the face of such profound changes, practices which may have been objectionable to no one in the time of Jefferson and Madison may today be highly offensive to many persons, the deeply devout and the nonbelievers alike."<sup>102</sup>

The difference between Rehnquist's method of constitutional interpretation and Brennan's method illustrates the fundamental tension that is inherent in the Court's role. Rehnquist's "original intent" approach reflects an overriding concern for principled judicial decisionmaking.<sup>103</sup> The Framers' intent, as manifested in the text and legislative history of the Constitution, provides the Court with a standard, independent of itself, by which to formulate adjudication. An objective standard restrains judicial activism, and maintains the Court's perceived legitimacy as the branch of government that is not accountable to the electorate.<sup>104</sup> Such an objective standard is particularly important in interpreting the Establishment Clause<sup>105</sup> because its exact meaning is not evident from the text.<sup>106</sup>

In contrast, Brennan's view of the Constitution emphasizes the Court's role as the protector of individual rights against the majoritarian

---

intent" should not govern constitutional interpretation. See *infra* note 125 and accompanying text.

98. Brennan, *supra* note 1, at 436-37.

99. *Marsh v. Chambers*, 463 U.S. 783, 816 (1983) (Brennan, J., dissenting).

100. *Id.* at 816-17 n.35 (Brennan, J., dissenting) (citing *Frontiero v. Richardson*, 411 U.S. 677 (1973) (gender discrimination); *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (race discrimination); *Colgrove v. Battin*, 413 U.S. 149, 155-58 (1973) (jury trial); *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (cruel and unusual punishment); *Katz v. United States*, 389 U.S. 347 (1967) (search and seizure)).

101. *Id.* at 817 (quoting *School Dist. of Abington v. Schempp*, 347 U.S. 203, 240-41 (1963) (Brennan, J., concurring)).

102. *Id.* (quoting *School Dist. of Abington v. Schempp*, 374 U.S. 203, 241 (1963) (Brennan, J., concurring)).

103. See *supra* notes 3-4 and accompanying text.

104. Brennan also recognizes the desirability of an external constraint on the Justices' personal predilections. He concedes that such a constraint lends legitimacy to an unaccountable, counter-majoritarian institution. Brennan, *supra* note 1, at 435.

105. See generally Van Patten, *supra* note 31.

106. DAVIS, *supra* note 11, at xvi.

political process.<sup>107</sup> In his words, "It is the very purpose of our Constitution—and particularly of the Bill of Rights—to declare certain values transcendent, beyond the reach of temporary political majorities."<sup>108</sup>

Although both methods of constitutional interpretation reflect legitimate concerns, "original intent" is particularly ill-suited to interpretation of the Establishment Clause for two reasons. The first is the nature of the right that the Establishment Clause protects—religious liberty.<sup>109</sup> As Brennan points out, this is a principle which cannot be guaranteed today if the scope of the Clause's protection is limited by eighteenth-century conditions.<sup>110</sup> Thus, "original intent" would not protect religious liberty in today's environment, even if this intent were discernable. The second reason that Rehnquist's interpretation of the Establishment Clause is inadequate is that the "original intent" is not discernable from the limited legislative history that is available.

## B. Rehnquist's Analysis of "Original Intent"

### 1. Thomas Jefferson's Views

In *Jaffree*, Rehnquist offhandedly dismissed Thomas Jefferson's views concerning religious freedom because Jefferson was in France when the First Amendment was adopted.<sup>111</sup> But "fidelity to the Constitution"<sup>112</sup> demands a more thorough examination of Jefferson's influence. One scholar points out that "even in France Jefferson was closer to these events than any Supreme Court Justice in the late twentieth century can hope to be."<sup>113</sup> Brennan's objection to the doctrine of "original intent" seems particularly applicable to Rehnquist's cursory dismissal of Jefferson's views: "It is arrogant to pretend that from our vantage we can gauge accurately the intent of the Framers on application of princi-

---

107. See Brennan, *supra* note 1, at 436-37.

Rehnquist also acknowledges this function of the Court: "A mere change in public opinion since the adoption of the Constitution, unaccompanied by a constitutional amendment, should not change the meaning of the Constitution. A merely temporary majoritarian groundswell should not abrogate some individual liberty truly protected by the Constitution." Rehnquist, *The Notion of a Living Constitution*, *supra* note 4, at 696-97. The Framers "wanted a Constitution that would check the excesses of majority rule, and they created an institution [the Supreme Court] to enforce the commands of the Constitution." WILLIAM H. REHNQUIST, *THE SUPREME COURT* 319 (1987).

108. Brennan, *supra* note 1, at 436.

109. Commentators generally agree that religious liberty is the central purpose of the Establishment Clause, and that it was intended at least to prevent an established church. Beyond that, however, they disagree. DAVIS, *supra* note 11, at 45-46.

110. *Marsh v. Chambers*, 463 U.S. 783, 816-17 (1983) (Brennan, J., dissenting); see also Brennan, *supra* note 1, at 437.

111. *Wallace v. Jaffree*, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting).

112. See *supra* note 2 and accompanying text.

113. Leo Pfeffer, *Foreword* to DAVIS, *supra* note 11, at xii.

ple to specific, contemporary questions."<sup>114</sup>

Brennan is particularly critical of the original intent method when existing records "provide sparse or ambiguous evidence of the original intention."<sup>115</sup> As there is such a paucity of evidence about the original intent behind the Establishment Clause,<sup>116</sup> a sincere attempt to discern that original intent should include all the evidence that is available.

Indeed, Jefferson's views on religion differed from those of his contemporaries.<sup>117</sup> As President, for example, Jefferson refused to issue Thanksgiving proclamations, believing them to constitute an establishment of religion.<sup>118</sup> Presidents Washington and Adams issued Thanksgiving proclamations,<sup>119</sup> and even Madison did so reluctantly.<sup>120</sup>

Nevertheless, as Jefferson was an active participant in public life, his understanding of the meaning of the Establishment Clause is indicative of the Clause's original meaning.<sup>121</sup> His "wall of separation" metaphor may well indicate the prevailing general public understanding of the Establishment Clause.<sup>122</sup> Rehnquist dismissed, as "a short note of courtesy," the letter in which Jefferson's metaphor first appeared.<sup>123</sup> Professor Steven Smith points out, however, that Jefferson's casual use of the metaphor strengthens, rather than weakens, the likelihood that the metaphor described what Americans generally understood the Clause to mean.<sup>124</sup>

Madison himself thought that the understanding of the people, rather than that of the Framers, should control the Constitution's interpretation.<sup>125</sup> Thus, if Madison's intended methodology is followed, Jef-

---

114. Brennan, *supra* note 1, at 435.

115. *Id.*

116. See DAVIS, *supra* note 11, at xvi.

117. Smith, *supra* note 16, at 973 n.100.

118. Laycock, *supra* note 8, at 914.

119. *Id.*

120. *Id.* President Madison issued Thanksgiving proclamations "only in time of war and at the request of Congress, and his proclamations merely invited citizens so disposed to unite their prayers on a single day." *Id.* Madison explained that he "was always careful to make the Proclamations absolutely indiscriminate, and merely recommendatory . . ." Letter from James Madison to Edward Livingston (July 10, 1822), reprinted in JAMES MADISON ON RELIGIOUS LIBERTY 82-83 (Robert Alley ed., 1985). Madison ultimately concluded that his proclamations had violated the Establishment Clause. Laycock, *supra* note 8, at 914 (citing Fleet, *Madison's Detached Memoranda*, 3 WM. & MARY Q. 535, 558-62 (3d ser. 1946)).

121. Smith, *supra* note 16, at 974 n.100.

122. *Id.*

123. Wallace v. Jaffree, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting).

124. Smith, *supra* note 16, at 974 n.100; see also DAVIS, *supra* note 11, at 140.

125. DAVIS, *supra* note 11, at 38-39. Regarding the understanding of the people, Madison stated:

I entirely concur in the propriety of resorting to the sense in which the Constitution was accepted and ratified by the nation. In that sense alone it is the legitimate Constitution. And if that be not the guide in expounding it, there can be no security for a consistent and stable, more than for a faithful, exercise of its powers.

erson's letter should carry greater evidentiary weight than the legislative history upon which Rehnquist relied.

## 2. *Madison's Role Outside the House of Representatives*

In assessing Madison's "original intent," Rehnquist considered only the record of the proceedings in the First Congress which lead to the adoption of the Establishment Clause.<sup>126</sup> He failed to consider other evidence of Madison's intent.

Most conspicuously, Rehnquist omitted Madison's *Memorial and Remonstrance Against Religious Assessments*<sup>127</sup> from his analysis. He asserted that *Everson* was "totally incorrect in suggesting that Madison carried [the views embodied in the *Remonstrance*] onto the floor of the United States House of Representatives when he proposed the language which would ultimately become the Bill of Rights."<sup>128</sup>

Given the role of the *Remonstrance* in leading to the First Amendment, it is surprising that Rehnquist did not consider it to be relevant legal authority.<sup>129</sup> One scholar considers the *Remonstrance* and Jefferson's "Bill for Establishing Religious Freedom" to be "twin instruments that marked a major turning point in the development of the doctrine of separation of church and state in the United States."<sup>130</sup>

Of all the states to abolish government support of religion, Virginia encountered the most dramatic battle.<sup>131</sup> The Church of England had been the established church of Virginia from 1631 until 1776.<sup>132</sup> In 1776, Virginia passed a statute that exempted nonmembers of the Church of England from taxes for the church's support, effectively disestablishing the church.<sup>133</sup> In 1779, however, a bill for a "general" tax assessment, to support religion on a nonpreferential basis, was introduced in the Vir-

---

Quoted in Jonathan K. Van Patten, *The Partisan Battle Over the Constitution: Meese's Jurisprudence of Original Intention and Brennan's Theory of Contemporary Ratification*, 70 MARQ. L. REV. 389, 399 (1987).

In order to prevent interpretation according to "original intent," Madison delayed publication of his notes of the Constitutional Convention until after his death. DAVIS, *supra* note 11, at 39. Madison stated: "As a guide in expounding and applying the provisions of the Constitution, the debates and incidental decisions of the Convention can have no authoritative character." Letter from James Madison to Thomas Ritchie (Sept. 15, 1791), *quoted in* DAVIS, *supra* note 11, at 39.

126. *Jaffree*, 472 U.S. at 91-114 (Rehnquist, J., dissenting).

127. *See supra* note 31 and accompanying text.

128. *Jaffree*, 472 U.S. at 99 (Rehnquist, J., dissenting).

129. Compare Rehnquist's rejection of the *Remonstrance* as an interpretive guide, *id.* at 98-99, with the statement at his nomination hearings that a judge should consider "whatever relevant legal materials there may be" in a case. *See supra* text accompanying note 5.

130. DAVIS, *supra* note 11, at 139.

131. *Id.* at 136.

132. *Id.*

133. *Id.* at 137.



ginia legislature.<sup>134</sup> In opposition to this bill,<sup>135</sup> Jefferson introduced his "Bill for Establishing Religious Freedom," which provided, in part, "that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities."<sup>136</sup> After extensive debate, the Virginia legislature did not pass either of the two diametrically opposed bills.<sup>137</sup>

Frustrated with the legislature's failure to support Christianity, Patrick Henry introduced another bill in 1784, which would require a general tax assessment to support Christianity.<sup>138</sup> Madison opposed the general assessment, but a majority of the Virginia legislature supported it.<sup>139</sup> Madison voted for a narrower bill, establishing the Episcopal Church, in order to avert the passage of the general assessment.<sup>140</sup> The legislature passed this narrower bill,<sup>141</sup> and postponed the final vote on the general assessment until the next session.<sup>142</sup>

In between legislative terms, Madison wrote the *Remonstrance*, opposing the general assessment.<sup>143</sup> The *Remonstrance*, which repeatedly expressed the concept of separationism,<sup>144</sup> was instrumental in defeating the proposed assessment, and in inspiring support for Jefferson's bill, which Madison reintroduced.<sup>145</sup> One scholar labels this battle in the Vir-

134. *Id.*

135. *Id.*

136. *Id.* at 173.

137. *Id.* at 137-38.

138. *Id.* at 138.

139. *Id.*

140. Letter from James Madison to Thomas Jefferson (Jan. 9, 1785), reprinted in JAMES MADISON ON RELIGIOUS LIBERTY 66-67 (Robert Alley ed., 1985).

141. *Id.*

142. DAVIS, *supra* note 11, at 138.

143. *Id.*

144. The Religion . . . of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right . . . is unalienable; because the opinions of men, depending only on the evidence contemplated by their own minds, cannot follow the dictates of other men . . . [I]n matters of Religion, no man's right is abridged by the institution of Civil Society, and . . . Religion is wholly exempt from its cognizance. . . . [I]f religion be exempt from the authority of the Society at large, still less can it be subject to that of the Legislative Body. . . . The preservation of a free government requires not merely[ ] that the metes and bounds which separate each department of power may be invariably maintained; but more especially, that neither of them be suffered to overleap the great Barrier which defends the rights of the people.

*Remonstrance*, *supra* note 31, reprinted in *Everson*, 330 U.S. at 64-65.

Throughout the *Remonstrance*, Madison argues that government has no authority over matters of conscience. He also makes clear that his objections are based upon principle: "[T]he same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment . . . ." *Remonstrance*, *supra* note 31, reprinted in *Everson*, 330 U.S. at 65-66.

145. DAVIS, *supra* note 11, at 138-39.

ginia legislature the "fullest expression" of a separationist "revolution."<sup>146</sup> By 1789, when Congress ratified the First Amendment, seven of the original thirteen states had banned government support of *any* church or churches.<sup>147</sup> Moreover, all six remaining states abolished state support of religion by 1833.<sup>148</sup> Rehnquist offers no satisfactory justification for ignoring the history surrounding the First Amendment.<sup>149</sup>

Rehnquist's assertion that Madison favored nonpreferential aid to religion is inconsistent, not only with the *Remonstrance*, but also with other writings of Madison. For example, Madison wrote a letter to his father, explaining his vote for the bill that established the Episcopal Church:

I consider the passage of this Act . . . as having been so far useful as to have parried for the present the Gen[eral] Assess[ment] which would otherwise have certainly been saddled upon us . . . . If it be unpopular among the laity it will soon be repealed, and will be a standing lesson to them of the danger of referring religious matters to the legislature.<sup>150</sup>

This letter shows that Madison voted for the establishment of a single church in order to avert the nonpreferential general assessment. Thus, the views that motivated Madison's vote in the Virginia legislature are inconsistent with the views that Rehnquist ascribed to Madison in *Wallace v. Jaffree*.<sup>151</sup> Professor Robert Alley, Executive Director of the James Madison Memorial Committee, explains that Madison feared a nonpreferential establishment of religion in general more than he feared an establishment of a single religion because a general, nonpreferential establishment would result in "tyranny of the majority."<sup>152</sup> This constitutes the "danger of referring religious matters to the legislature."<sup>153</sup>

Madison also described his opposition to nonpreferential aid to religion in a letter to Thomas Jefferson, in which he further explained his vote for the Episcopal Church bill:

---

146. *Id.* at 139.

147. *Id.*

148. *Id.*

149. See *Wallace v. Jaffree*, 472 U.S. 38, 91-114 (1985) (Rehnquist, J., dissenting).

150. Letter from James Madison, Jr. to James Madison, Sr. (Jan. 6, 1785), reprinted in *JAMES MADISON ON RELIGIOUS LIBERTY* 66 (Robert Alley ed., 1985).

151. 472 U.S. 38, 98 (1985) (Rehnquist, J., dissenting) ("Madison . . . saw the [First] Amendment as designed to prohibit the establishment of a national religion, and perhaps to prevent discrimination among sects. He did not see it as requiring neutrality on the part of government between religion and irreligion."); *id.* at 99 (Rehnquist, J., dissenting) (The members of the First Congress were "definitely not concerned about whether the Government might aid all religions evenhandedly.").

152. Telephone interview with Professor Robert S. Alley, Executive Director of the James Madison Memorial Committee (Aug. 31, 1991).

153. See *supra* text accompanying note 150.

[Both] friends and adversaries of the measure . . . will probably concur in a revision if not a repeal of the law. . . . [T]he law is in various points of view exceptionable. But . . . [a] negative of the bill . . . would have doubled the eagerness and the pretexts for a much greater evil, [Patrick Henry's] General Assessment, which there is good ground to believe was parried by this partial gratification of its warmest votaries. . . . Should [the General Assessment] ever pass into a law in its present form it may [and] will be easily eluded. It is chiefly obnoxious on account of its dishonorable principle and dangerous tendency.<sup>154</sup>

The letter demonstrates that Madison considered nonpreferential aid to religion in general to be "a much greater evil" than the establishment of a single religion.

A letter to Edward Livingston, in which Madison explained his Thanksgiving proclamations, demonstrates that Madison shared the concerns of modern religious separationists<sup>155</sup> as well:

Notwithstanding the general progress made within the two last centuries in favor of this branch of liberty, [and] the full establishment of it, in some parts of our Country, there remains in others a strong bias towards the old error, that without some sort of alliance or coalition between [government] and [r]eligion neither can be duly supported. Such indeed is the tendency to such a coalition, and such is its corrupting influence on both the parties, that the danger cannot be too carefully guarded [against]. And in a [government] of opinion, like ours, the only effectual guard must be found in the soundness and stability of the general opinion on the subject. Every new [and] successful example therefore of a *perfect separation between ecclesiastical and civil matters, is of importance*. And I have no doubt that every new example, will succeed, as every past one has done, in shewing [sic] that *religion & [government] will both exist in greater purity, the less they are mixed together*.<sup>156</sup>

Rehnquist's perception of Madison's "original intent" is incomplete. Rehnquist looks only at the "glimpses of Madison's thinking [that are] reflected by [his] actions on the floor of the House in 1789."<sup>157</sup> Madison left evidence, in addition to these "glimpses," of his intent. Because Rehnquist does not consider this evidence, he reaches a conclusion that is inconsistent with it. A more thorough examination of the evidence yields a more complete picture of "original intent."

---

154. Letter from James Madison to Thomas Jefferson (Jan. 9, 1785), reprinted in JAMES MADISON ON RELIGIOUS LIBERTY 66-67 (Robert Alley ed., 1985).

155. See *supra* note 19 and accompanying text.

156. Letter from James Madison to Edward Livingston (July 10, 1822), reprinted in JAMES MADISON ON RELIGIOUS LIBERTY 82-83 (Robert Alley ed., 1985) (emphasis added).

157. *Wallace v. Jaffree*, 472 U.S. 38, 98 (1985) (Rehnquist, J., dissenting).

### 3. *The Records of the First Congress*

In *Jaffree*, Rehnquist cited the language that Madison originally proposed for the Establishment Clause,<sup>158</sup> his speech to the House in support of the Select Committee's revised language,<sup>159</sup> and his response to Representative Huntington's objection that the Committee's language might be "hurtful to the cause of religion."<sup>160</sup> He used these cites to contend that Madison did not intend a separationist construction.<sup>161</sup> It is possible to reach a conclusion contrary to Rehnquist's, even based solely upon these records of the First Congress.

The language which Madison originally proposed, as well as the language he used in his speech to the House, can be read to prohibit any state action that infringes upon any "right of conscience," including the right not to worship.<sup>162</sup> Madison first proposed this language: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed."<sup>163</sup> The House referred the language to a committee, which revised it to read: "[N]o religion shall be established by law, nor shall the equal rights of conscience be infringed."<sup>164</sup> Madison told the House that he took the words to mean that Congress "should not establish a religion . . . nor compel men to worship God in any manner contrary to their conscience."<sup>165</sup> This description supports the view, contrary to Rehnquist's interpretation, that the Establishment Clause was intended to reach any encroachment upon the freedom of conscience, including the right not to worship at all.<sup>166</sup> Rehnquist himself concedes Madison's concern that the Necessary and Proper Clause might be used to "infringe the rights of conscience."<sup>167</sup>

Madison responded to Representative Huntington's objection to the proposed language by suggesting that the word "national" be added to the House committee's language,<sup>168</sup> amending it to read: "No *national* religion shall be established by law, nor shall the equal rights of conscience be infringed." This amended version would have retained the

---

158. *Id.* at 94.

159. *Id.* at 95.

160. *Id.* at 96.

161. *Id.* at 98-99; see *supra* Part III.

162. Michael D. Lieder, *Religious Pluralism and Education in Historical Perspective: A Critique of the Supreme Court's Establishment Clause Jurisprudence*, 22 WAKE FOREST L. REV. 813, 818-19 (1987).

163. *Jaffree*, 472 U.S. at 94 (Rehnquist, J., dissenting) (quoting 1 ANNALS OF CONG. 434 (Joseph Gales ed., 1789)).

164. *Id.* at 95 (quoting 1 ANNALS OF CONG. 729 (Joseph Gales ed., 1789)).

165. *Id.* (quoting 1 ANNALS OF CONG. 730 (Joseph Gales ed., 1789)).

166. Lieder, *supra* note 162, at 818-19 n.30.

167. *Jaffree*, 472 U.S. at 95-96 (Rehnquist, J., dissenting).

168. *Id.* at 96.

language pertaining to the "rights of conscience," and thus could also be read to protect the right not to worship.

Madison then explained this suggestion.<sup>169</sup> Read in isolation, this explanation could be read to support Rehnquist's interpretation.<sup>170</sup>

Taken as a whole, however, the legislative history is ambiguous at best.<sup>171</sup> The doctrine of *stare decisis* dictates that the *Lemon* test, which incorporates Justice Black's analysis of the Framers' intent, should remain intact.<sup>172</sup>

169. [Madison] believed that the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform. He thought that if the word "national" was introduced, it would point the amendment directly to the object it was intended to prevent.

*Id.* (citing 1 ANNALS OF CONG. 731 (Joseph Gales ed., 1789)).

170. *Lieder*, *supra* note 162, at 818-19 n.30.

171. *Id.* at 818-20.

172. *Stare decisis* is the doctrine under which the Court abides by decided precedent. BLACK'S LAW DICTIONARY 1406 (6th ed. 1990). Rehnquist stated in *Jaffree* that "*stare decisis* may bind courts as to matters of law, but it cannot bind them as to matters of history." 472 U.S. at 99 (Rehnquist, J., dissenting). However, Rehnquist's dissent is directed as much toward *Everson's* "law" (separationism) as toward its "history." See *id.* at 91-114.

Rehnquist has also stated his view that precedent may be entitled to less weight in the field of constitutional law than in other areas. *Nomination Hearings*, *supra* note 2, at 19. In contrast, however, Madison indicated that the Court's precedent should be afforded particular deference when it interprets the Constitution:

[W]hy are judicial precedents, when formed on due discussion and consideration, and deliberately sanctioned by reviews and repetitions, regarded as of binding influence, or rather of authoritative force, in settling the meaning of a law? . . . [B]ecause . . . the good of society requires that the rules of conduct . . . should be certain and known . . .

Can it be of less consequence that the meaning of a constitution should be fixed and known than that the meaning of a law should be so? Can, indeed, a law be fixed in its meaning and operation unless the Constitution be so? On the contrary, if a particular legislature, differing in the construction of the Constitution from a series of preceding constructions, proceed to act on that difference, they not only introduce uncertainty and instability in the Constitution, but in the laws themselves[ ] inasmuch as all laws preceding the new construction and inconsistent with it are not only annulled for the future, but virtually pronounced nullities from the beginning.

. . . Has the wisest and most conscientious judge ever scrupled to acquiesce in decisions, in which he has been overruled by the matured opinions of the majority of his colleagues, and subsequently to conform himself thereto, as to authoritative expositions of the law? And is it not reasonable that the same view of the official oath [to support the Constitution] should be taken by a legislator, acting under the Constitution, which is his guide, as is taken by a judge, acting under the law, which is his?

There is, in fact and in common understanding, a necessity of regarding a course of practice, as above characterized, in the light of a legal rule of interpreting a law; and there is a like necessity of considering it a constitutional rule of interpreting a constitution.

Letter from James Madison to C.J. Ingersoll (June 25, 1831) (quoted in JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 389 (1891)). Madison's letter suggests that the Court should not overturn its separationist precedent absent a more compelling demonstration of error than Rehnquist provides.

### C. The "Nonpreferentialist" Position and Religious Minorities

Chief Justice Rehnquist's "nonpreferentialist" interpretation of the Establishment Clause also raises certain policy concerns. The nonpreferentialist view would allow government to aid religion in general. "Nonpreferential" aid to religion is inevitably shaped by the majority view—usually Christianity.<sup>173</sup> "Nonpreferential" aid thus subjects this most personal of rights to the majoritarian process.<sup>174</sup> For example, a Jewish, Buddhist, or Moslem schoolchild may be faced with a choice between participating in a Christian religious exercise, thus compromising his or her beliefs, or withdrawing, thereby calling attention to his or her nonconformity.<sup>175</sup> This choice pressures the schoolchild to conform to the majoritarian norm.<sup>176</sup>

Moreover, "nonpreferential" aid to Christianity may offend some devout Christians.<sup>177</sup> For example, some Christians have complained that government Christmas displays, such as crèches, detract from the sacred meaning of the symbols.<sup>178</sup>

Even if "nonpreferential" aid could be administered without favor-

---

173. See, e.g., *Board of Educ. v. Mergens*, 496 U.S. 226 (1990) (Christian club sought public school sponsorship); *Lynch v. Donnelly*, 465 U.S. 668 (1984) (city erected Christian nativity scene); *Stone v. Graham*, 449 U.S. 39 (1980) (state statute required public schools to post the Ten Commandments in each classroom); *Stein v. Plainwell Community Schs.*, 822 F.2d 1406 (6th Cir. 1987) (public school conducted Christian prayer).

174. See Laycock, *supra* note 8, at 920; see also Respondent's Brief at 44-47, *Lee v. Weisman*, No. 90-1014 (U.S. argued Nov. 6, 1991) (arguing that the prayer in *Weisman* pressured schoolchildren to conform to the majority's notion of acceptable behavior).

175. *Jaffree*, 472 U.S. at 72 (O'Connor, J., concurring); Respondent's Brief at 44-47, *Weisman*, No. 90-1014.

176. *Jaffree*, 472 U.S. at 72 (O'Connor, J., concurring); Respondent's Brief at 44-47, *Weisman*, No. 90-1014.

177. In addition to the objections of minority religions and the nonreligious, there are also objections, by popular religions, to government involvement in religion. See *supra* note 19.

The amicus brief filed by the Solicitor General in support of the petitioners in *Weisman* implicitly recognizes these objections. The brief cites the Oath Clauses of the Constitution as evidence that "acknowledgment of religious devotion [is] entirely consistent with the civic order provided for in that document." Brief for the United States as Amicus Curiae Supporting Petitioners at 13, *Weisman*, No. 90-1014. After giving a thorough description of the religious significance of the oath, *id.* at 13-14, the brief addresses the Clauses' provision for substituting an affirmation for the oath. The brief notes that the provision for affirmation "was afforded not for the irreligious who might not accept the religious significance of an oath, but for those whose religious scruples precluded such a solemn invocation for worldly ends." *Id.* at 14-15 n.12.

Thus, the Oath Clauses provide for the objections that the religious may have to a general establishment. In the eyes of the Solicitor General, however, the objections of "the irreligious" apparently do not warrant such consideration.

178. *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 651 n.8 (1989) (Stevens, J., concurring in part and dissenting in part); *Lynch v. Donnelly*, 465 U.S. 668, 712 n.19 (1984) (Brennan, J., dissenting).

ing the majority religion,<sup>179</sup> and without offending devout Christians, Rehnquist's position is particularly troubling when applied to the non-religious. The Census Bureau reports that nine percent of Americans have "no religious preference."<sup>180</sup> Another study concludes that six percent do not believe in God.<sup>181</sup> A "nonpreferential" establishment would force these citizens to support religion.<sup>182</sup> Freedom of conscience, including the right of nonbelief, should be protected from the political process. The individual's right to choose his or her beliefs should not be subjugated to the views of the prevailing majority.

Justice O'Connor formulated an interpretation of the Establishment Clause in *Lynch v. Donnelly*<sup>183</sup> that is a compromise between the accommodationist and separationist views. Unlike Rehnquist's interpretation, O'Connor's "no endorsement" test need not discriminate against religious minorities or the nonreligious. As demonstrated in *County of Allegheny v. American Civil Liberties Union*,<sup>184</sup> the "no endorsement" test can be applied so as to protect the rights of religious minorities and the nonreligious.<sup>185</sup>

## V. O'Connor's "No Endorsement" Position

### A. *Lynch v. Donnelly*

The Court's accommodationist stance in *Lynch v. Donnelly*<sup>186</sup> reflects Rehnquist's influence. The *Lynch* Court held that a city's Christmas display, which included a Christian nativity scene, a Santa Claus house, and a Christmas tree, did not violate the Establishment Clause.<sup>187</sup>

Writing for the Court, Chief Justice Burger discounted the binding effect of his own opinion in *Lemon*, referring to two Establishment

---

179. Mr. Lieder contends that minority religions are protected by the majoritarian political process. Lieder, *supra* note 162, at 884-85. He argues that the rise of religious pluralism allows minority religious groups to protect themselves within the political process through issue-specific political alliances. *Id.*

180. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1990, at 55.

181. See Brief of the United States Catholic Conference as Amicus Curiae in Support of the Petitioners at 14 n.34, *Weisman*, No. 90-1014 (citing GEORGE GALLUP & JIM CASTELLI, *THE PEOPLE'S RELIGION* 4 (1989)).

182. "If the state attempts to support all religions, it compels those who claim no religion at all—their right in a secular state—to support what they do not believe." DAVIS, *supra* note 11, at 147-48; see also Norman Dorsen, *The Religion Clauses and Nonbelievers*, 27 WM. & MARY L. REV. 863 (1986).

183. 465 U.S. 668, 687-94 (1984) (O'Connor, J., concurring).

184. 492 U.S. 573 (1989).

185. See *infra* Part V.B.

186. 465 U.S. 668 (1984).

187. *Id.* at 687.

Clause cases that did not apply the test.<sup>188</sup> Nevertheless, the majority in *Lynch* ultimately used the *Lemon* test to reach its holding.<sup>189</sup> The Court held that the crèche had the legitimate secular purpose of celebrating the holiday season,<sup>190</sup> that any benefit conferred upon religion by the crèche was insignificant,<sup>191</sup> and that the city's use of the crèche did not constitute impermissible entanglement.<sup>192</sup>

Burger discredited Jefferson's "wall of separation" metaphor as "not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state."<sup>193</sup> He went on to state that the Establishment Clause "affirmatively mandates accomodation . . . of all religions . . . ."<sup>194</sup> Justice Rehnquist joined in Burger's majority opinion.

Justice Brennan's separationist dissent stands in sharp contrast. Brennan argued that the Establishment Clause requires that "the organs of government remain strictly separate and apart from religious affairs . . . ."<sup>195</sup> Justices Marshall, Blackmun, and Stevens joined in Brennan's dissent.

Justice O'Connor provided the deciding vote. In addition to joining Burger's opinion, she also wrote a concurrence.<sup>196</sup> Her concurring opinion shaped an intermediate position between the accomodationist and separationist views.<sup>197</sup> Under O'Connor's view, the government would run afoul of the Establishment Clause if it excessively entangled itself with religious institutions, or if it endorsed or disapproved of religion.<sup>198</sup> This proposal has come to be termed the "no endorsement" test.<sup>199</sup>

O'Connor's interpretation retains all three prongs of the *Lemon* test. Under her view, the entanglement prong "is properly limited to institutional entanglement."<sup>200</sup> Thus, O'Connor rejected the argument that the political divisiveness caused by the crèche constituted "entanglement" which would violate the Establishment Clause.<sup>201</sup>

According to O'Connor, the "purpose" prong asks "whether the government intends to convey a message of endorsement or disapproval

---

188. *Id.* at 679 (citing *Marsh v. Chambers*, 463 U.S. 783 (1983); *Larson v. Valente*, 456 U.S. 228 (1982)).

189. *Id.* at 681-85.

190. *Id.* at 681.

191. *Id.* at 683.

192. *Id.* at 684.

193. *Id.* at 673.

194. *Id.*

195. *Id.* at 698 (Brennan, J., dissenting).

196. *Id.* at 687-94 (O'Connor, J., concurring).

197. *See id.*

198. *Id.* at 687-88.

199. *See Smith, supra* note 16, at 957.

200. *Lynch*, 465 U.S. at 689 (O'Connor, J., concurring).

201. *Id.* at 689-90.



of religion.”<sup>202</sup> The “effect” prong asks whether the government’s practice has “the effect of communicating a message of endorsement or disapproval of religion.”<sup>203</sup> “An affirmative answer to either question should render the challenged practice invalid.”<sup>204</sup> O’Connor found that the crèche in question was not intended to endorse, and did not have the effect of endorsing, Christianity.<sup>205</sup>

## B. *County of Allegheny v. American Civil Liberties Union*

The Court applied O’Connor’s test in *County of Allegheny v. American Civil Liberties Union*,<sup>206</sup> citing her concurrence in *Lynch*.<sup>207</sup> In *Allegheny*, the Court held that a Christian nativity scene on display in a county courthouse violated the Establishment Clause,<sup>208</sup> but concluded that a separate display of a Jewish menorah next to a Christmas tree did not.<sup>209</sup>

The Court reasoned that the Establishment Clause is based upon the country’s religious diversity.<sup>210</sup> The Court held that the Establishment Clause protects that diversity as it exists today, *even if* the Clause was originally “understood to protect only the diversity within Christianity.”<sup>211</sup> The Court, for the sake of argument, considered Rehnquist’s interpretation of the Framers’ intent.<sup>212</sup> They rejected his conclusion, however.<sup>213</sup>

Thus, *Allegheny* firmly rejects Rehnquist’s nonpreferentialist position.<sup>214</sup> Although Rehnquist asserted in *Jaffree* that the Establishment

---

202. *Id.* at 691.

203. *Id.* at 692.

204. *Id.* at 690.

205. *Id.* at 694.

206. 492 U.S. 573, 594-97 (1989).

207. Interestingly, Justice O’Connor did not join in Part III.B of the *Allegheny* opinion. This Part of the opinion adopted the analytical framework that O’Connor set forth in *Lynch*: “The effect of the display depends upon the message that the government’s practice communicates: the question is ‘what viewers may fairly understand to be the purpose of the display.’” *Allegheny*, 492 U.S. at 595 (quoting *Lynch*, 465 U.S. at 692 (O’Connor, J., concurring)). Instead, O’Connor wrote a separate opinion concurring in part and concurring in the judgment: “[T]he Establishment Clause ‘prohibits government from making adherence to a religion relevant in any way to a person’s standing in the political community. The government violates this prohibition if it endorses or disapproves of religion.’” *Id.* at 625 (citations omitted).

208. *Allegheny*, 492 U.S. at 602.

209. A majority of the Court reached this result through three separate opinions: 492 U.S. at 620 (Blackmun, J.); *id.* at 637 (O’Connor, J., concurring); *id.* at 667 (Kennedy, J., concurring and dissenting).

210. *Allegheny*, 492 U.S. at 589.

211. *Id.* at 590.

212. *Id.*

213. *Id.*

214. Rehnquist’s position is described *supra* Part III.

Clause permits the government to favor religion generally,<sup>215</sup> *Allegheny* emphasizes that the Establishment Clause guarantees religious liberty and equality to "the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism."<sup>216</sup> *Allegheny* "squarely . . . rejected the proposition that the Establishment Clause is to be interpreted in light of any favoritism for Christianity that may have existed among the Founders of the Republic."<sup>217</sup> Using O'Connor's Establishment Clause analysis, the Court held that the Establishment Clause "preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred."<sup>218</sup>

Chief Justice Rehnquist joined in Justice Kennedy's dissenting opinion.<sup>219</sup> Justice Kennedy viewed both the crèche and the menorah as constitutional.<sup>220</sup> He applied *Lemon* begrudgingly,<sup>221</sup> and expressed unequivocal accommodationist sentiment:

Government policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage. . . . [T]he Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in our society. . . . A categorical approach would install federal courts as jealous guardians of an absolute "wall of separation," sending a clear message of disapproval.<sup>222</sup>

Kennedy would use a "coercion" test to demarcate the border between constitutional "accommodation" and unconstitutional "establishment" of religion.<sup>223</sup> This analysis is derived from a nine-page article written by Professor McConnell.<sup>224</sup> In his article, Professor McConnell asserts simply that the Framers considered "coercion" to be a necessary element of an Establishment Clause violation.<sup>225</sup> Under Kennedy's formulation, "government may not coerce anyone to support or participate in any religion or its exercise."<sup>226</sup>

Kennedy does not consider "passive and symbolic" governmental

---

215. *Wallace v. Jaffree*, 472 U.S. 38, 106 (1985) (Rehnquist, J., dissenting).

216. *Allegheny*, 492 U.S. at 590 (quoting *Jaffree*, 472 U.S. at 52).

217. *Id.* at 605 n.55.

218. *Id.* at 593 (quoting *Jaffree*, 472 U.S. at 70 (O'Connor, J., concurring in the judgment)) (emphasis added).

219. *Id.* at 655-79 (Kennedy, J., concurring in the judgment in part and dissenting in part).

220. *Id.* at 667.

221. "I am content for present purposes to remain within the *Lemon* framework, but do not wish to be seen as advocating, let alone adopting, that test as our primary guide in this difficult area. . . . Substantial revision of our Establishment Clause doctrine may be in order . . . ." *Id.* at 655-56.

222. *Id.* at 657 (citations omitted).

223. *Id.* at 659-60.

224. Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1986).

225. *Id.* at 935.

226. *Allegheny*, 492 U.S. at 659 (Kennedy, J., concurring and dissenting).

activity, such as a crèche, "coercive."<sup>227</sup> He would judge such "noncoercive" activity by this historical test: "Noncoercive government action within the realm of flexible accommodation or passive acknowledgment of existing symbols does not violate the Establishment Clause unless it benefits religion in a way more direct and more substantial than practices that are accepted in our national heritage."<sup>228</sup> The Court, however, explicitly rejected the "no coercion" interpretation of the Establishment Clause.<sup>229</sup>

Kennedy criticized O'Connor's "no endorsement" test as "flawed in its fundamentals and unworkable in practice."<sup>230</sup> In Kennedy's view, the "no endorsement" test would invalidate traditional religious practices, such as Christmas caroling.<sup>231</sup> He objected that O'Connor's test favors minority religious views.<sup>232</sup> Minority religions, however, are the most likely to be discriminated against by the majoritarian political process.<sup>233</sup> Thus, they are most in need of judicially-enforced constitutional protection.

### C. *Board of Education v. Mergens*

Rehnquist indicated in *Board of Education v. Mergens*<sup>234</sup> that he may be willing to accept O'Connor's "no endorsement" view. In *Mergens*, a student proposed to form a Christian club at her public high school.<sup>235</sup> The school refused to officially sanction the club, citing the Establishment Clause.<sup>236</sup> The student then sued the school under the Equal Access Act.<sup>237</sup> The Equal Access Act prohibits public secondary schools that maintain a "limited open forum" from denying "equal access" to student groups on the basis of the "religious, political, philosophical, or other content" of their speech.<sup>238</sup>

O'Connor wrote the majority opinion, which held that the school had violated the Equal Access Act.<sup>239</sup> She also wrote the plurality opin-

---

227. *See id.* at 662.

228. *Id.* at 662-63.

229. *Id.* at 597-98 n.47. Although *Allegheny* rejected the "no coercion" analysis, briefs filed in the *Weisman* case reassert it. Brief for the Petitioners at 14-44, *Weisman*, No. 90-1014; Brief for the United States as Amicus Curiae Supporting Petitioners at 19 n.18, *Weisman*, No. 90-1014.

230. *Allegheny*, 492 U.S. at 669 (Kennedy, J., concurring and dissenting).

231. *Id.* at 674 n.10.

232. *Id.* at 676-77.

233. *See supra* Part IV.C.

234. 110 S. Ct. 2356 (1990).

235. *Id.* at 2362.

236. *Id.* at 2363.

237. 20 U.S.C. §§ 4071-4074 (1988).

238. 20 U.S.C. § 4071(a) (1988).

239. *Mergens*, 110 S. Ct. at 2373. O'Connor was joined, in this part of her opinion, by Rehnquist, White, Blackmun, Scalia, and Kennedy.

ion, which held that the Equal Access Act did not violate the Establishment Clause.<sup>240</sup>

O'Connor applied her "no endorsement" test to the Establishment Clause claim. In doing so, she distinguished between *government* endorsement of religion and *private* endorsement of religion: "[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."<sup>241</sup> The Christian club was deemed acceptable because the speech was that of the students, rather than the school.<sup>242</sup> The plurality deferred to a congressional finding that the use of high school facilities for a religious use would not be perceived by the students as "state sponsorship of religion."<sup>243</sup>

Rehnquist joined not only in the majority opinion, which found a violation of the Equal Access Act, but also in this part of O'Connor's opinion which applied the "no endorsement" test to the Establishment Clause claim. It is significant that Rehnquist could have avoided adopting the "no endorsement" test, without affecting the outcome of *Mergens*.<sup>244</sup> It appears that Rehnquist may be willing to accept "endorsement" as the standard by which to evaluate government sponsorship of private speech.

## VI. *Lee v. Weisman*

*Lee v. Weisman* began as "a relatively minor church-state skirmish."<sup>245</sup> A Jewish family sought an injunction to prevent prayers at their daughter's public school graduation ceremony in Providence, Rhode Island.<sup>246</sup> The district court held that the graduation prayers vio-

---

240. *Id.* at 2370. O'Connor was joined here by Rehnquist, White, and Blackmun.

241. *Id.* at 2372 (emphasis in original).

242. *Id.*

243. *Id.*

244. Justices Marshall and Brennan also accepted the "no endorsement" test. *Id.* at 2376-79 (Marshall, J., with Brennan, J., concurring in the judgment). Marshall stated, however, that the high school "must fully disassociate itself from the Club's religious speech and avoid appearing to sponsor or endorse the Club's goals." *Id.* at 2382 (emphasis added).

On the other hand, Justices Kennedy and Scalia rejected the "no endorsement" test. *Id.* at 2377 (Kennedy, J., with Scalia, J., concurring in part and concurring in the judgment). The relevant inquiry for Kennedy is whether the school "imposes pressure" upon students. *Id.* at 2378.

Rehnquist could have avoided the "no endorsement" test, either by joining in Kennedy's opinion, or by writing his own. The result in the case would not have been affected.

245. Rob Boston, *Bushwacking the First Amendment*, CHURCH & STATE, Apr. 1991, at 4.

246. A motion for a temporary restraining order to prevent the prayers was denied. *Weisman v. Lee*, 728 F. Supp. 68, 69 (D.R.I. 1990). The ceremony in fact went forward, and included both an invocation and a benediction. The invocation read as follows:

lated the Establishment Clause,<sup>247</sup> and the First Circuit agreed.<sup>248</sup> Providence school officials petitioned the Supreme Court for certiorari, based upon conflicting holdings in the circuit courts with respect to which line of cases governs school graduation prayers.<sup>249</sup>

The Sixth Circuit held, in *Stein v. Plainwell Community Schools*,<sup>250</sup> that public school graduation prayers are analogous to the legislative and judicial prayers upheld in *Marsh v. Chambers*.<sup>251</sup> Furthermore, the Sixth Circuit found that there was less opportunity for indoctrination at graduation ceremonies than in the classroom for two reasons: first, the public nature of the ceremonies and the usual presence of parents provided a buffer from religious coercion; second, because the prayers were not led by a teacher or school official, they did not implicate the teacher/student relationship.<sup>252</sup> Therefore, the Sixth Circuit applied *Marsh*,<sup>253</sup> rather than *Lemon*, to the school prayers in *Stein*. The *Stein* court ultimately

---

God of the Free, Hope of the Brave:

For the legacy of America where diversity is celebrated and the rights of minorities are protected, we thank You. May these young men and women grow up to enrich it.

For the liberty of America, we thank You. May these new graduates grow up to guard it.

For the political process of America in which all its citizens may participate, for its court system where all can seek justice we thank You. May those we honor this morning always turn to it in trust.

For the destiny of America we thank You. May the graduates of Nathan Bishop Middle School so live that they might help to share it.

May our aspirations for our country and for these young people, who are our hope for the future, be richly fulfilled.

AMEN

The benediction read:

O God, we are grateful to You for having endowed us with the capacity for learning which we have celebrated on this joyous commencement.

Happy families give thanks for seeing their children achieve an important milestone. Send Your blessings upon the teachers and administrators who helped prepare them.

The graduates now need strength and guidance for the future. Help them to understand that we are not complete with academic knowledge alone. We must each strive to fulfill what You require of us all: To do justly, to love mercy, to walk humbly.

We give thanks to You, Lord, for keeping us alive, sustaining us and allowing us to reach this special, happy occasion.

AMEN

Both are reproduced in *Weisman v. Lee*, 908 F.2d 1090, 1098 n.\* (1st Cir. 1990) (Campbell, J., dissenting).

247. *Weisman v. Lee*, 728 F. Supp. 68, 72 (D.R.I. 1990).

248. *Weisman v. Lee*, 908 F.2d 1090 (1st Cir. 1990).

249. Under the heading "Reasons for Granting the Writ," the petition states: "This case starkly presents a conflict in the circuits over the proper application of, and interrelationship between . . . *Lemon* and *Marsh*." Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit at 6, *Lee v. Weisman*, No. 90-1014 (U.S. argued Nov. 6, 1991).

250. 822 F.2d 1406 (6th Cir. 1987).

251. *Id.* at 1409.

252. *Id.*

held that the school prayers were unconstitutional under *Marsh* because the prayers were Christian, and therefore sectarian.<sup>254</sup>

In *Weisman v. Lee*,<sup>255</sup> the First Circuit expressly rejected the *Stein* court's reasoning, and held that the school graduation prayer violated the "effect" prong of *Lemon*.<sup>256</sup> Judge Bownes' concurrence cited O'Connor's opinion in *Lynch v. Donnelly* as controlling authority for both the "effect" prong and the "entanglement" prong of *Lemon*.<sup>257</sup> In applying the "secular purpose" prong of the *Lemon* test, Judge Bownes cited *Wallace v. Jaffree*, in addition to *Lynch*. He distinguished *Marsh* (which did not apply *Lemon*)<sup>258</sup> as "inapplicable to school prayer cases."<sup>259</sup> He also cited Black's broad separationist language in *Everson v. Board of Education*.<sup>260</sup>

Judge Bownes considered Rehnquist's *Jaffree* dissent, but dismissed it.<sup>261</sup> He did so because the historical record of the Framers' intent is inconclusive, and because conditions have changed since the Constitution was written.<sup>262</sup> Judge Bownes followed *Allegheny's* holding that the Establishment Clause now "'guarantee[s] religious liberty and equality to the infidel, the atheist, or the adherent of a non-Christian faith' " even if the Establishment Clause was originally understood to protect only the diversity within Christianity.<sup>263</sup>

Thus, the First and Sixth Circuits are in direct conflict over the scope of the *Marsh* exception to *Lemon*.<sup>264</sup> The school officials in *Weisman* based their petition for certiorari upon this conflict.<sup>265</sup>

253. *Id.* *Marsh* did not apply the *Lemon* test. See *supra* notes 53-56 and accompanying text.

254. *Id.* at 1410.

255. 908 F.2d 1090 (1st Cir. 1990).

256. The majority opinion for the First Circuit simply affirmed "the sound and pellucid opinion of the district court," without further elaboration. *Id.* at 1090.

The district court, declining to follow *Stein*, had held that the prayer violated the "effect" prong of *Lemon*. That court held that *Marsh* created a narrow exception to *Lemon*, "limited to the unique situation of legislative prayer." *Weisman v. Lee*, 728 F. Supp. 68, 74 (D.R.I. 1990).

257. 908 F.2d at 1095 (Bownes, J., concurring).

258. See discussion *supra* notes 53-56 and accompanying text.

259. 908 F.2d at 1096 (Bownes, J., concurring).

260. *Id.* at 1097 (Bownes, J., concurring). *Everson* is discussed *supra* Part I.A.

261. 908 F.2d at 1093.

262. *Id.*

263. *Id.* at 1093 (quoting *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 590 (1989)).

264. Recall Professor Cord's characterization of Brennan's dissent in *Marsh* as a "masterful display of damage control." See *supra* note 53. Brennan's "damage control" will be severely tested by the *Weisman* decision.

265. Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit at 6, *Weisman*, No. 90-1014; see *supra* note 249.

The argument in *Lee v. Weisman* has now advanced far beyond this narrow disagreement, however. In support of the the Providence school officials, the Solicitor General filed a brief urging the Court to hear the case.<sup>266</sup> Rather than addressing the Circuits' narrow disagreement, the Solicitor General criticizes the *Lemon* test<sup>267</sup> and the principle of separation of church and state.<sup>268</sup>

The Court granted the petition for certiorari, and the Solicitor General filed another brief arguing that the prayers in *Weisman* are constitutional.<sup>269</sup> Although the petitioners in *Weisman* criticize *Lemon*,<sup>270</sup> they stop short of calling for its overthrow.<sup>271</sup> In contrast, the Solicitor General explicitly asks the Court to overturn *Lemon*.<sup>272</sup>

Both the Petitioners and the Solicitor General argue for the "no coercion" analysis that was rejected by the Court in *Allegheny*.<sup>273</sup> The "no coercion" analysis begs the question: Is a nonpreferential establishment, such as the generic prayer in *Weisman*, coercive? Both the petitioners and the Solicitor General cite Madison's brief comments in the First Congress in support of a "no coercion" standard.<sup>274</sup> However, a more thorough examination of the evidence indicates that the Framers viewed nonpreferential establishments as coercive.<sup>275</sup> Furthermore, the coercive effect of a nonpreferential establishment is more pronounced today than in the time of the Framers, because the United States is now more diverse in its religious composition.<sup>276</sup> "Nonpreferential" establishments of religion, such as the prayers in *Weisman*, pressure schoolchildren to conform to the majority viewpoint.<sup>277</sup> "Nonpreferential" aid to

---

266. Brief for the United States as Amicus Curiae, *Weisman*, No. 90-1014.

267. *Id.* at 8.

268. *Id.* at 15 n.17 (arguing that separation of church and state amounts to the establishment of "irreligion").

269. Brief for the United States as Amicus Curiae Supporting Petitioners, *Weisman*, No. 90-1014.

270. Brief for the Petitioners at 9-13, *Weisman*, No. 90-1014.

271. Instead, the petitioners argue that the prayers would survive scrutiny under *Lemon*. *Id.* at 44-49.

272. Brief for the United States as Amicus Curiae Supporting Petitioners at 6, 20, *Weisman*, No. 90-1014.

273. Brief for the Petitioners at 14-44, *Weisman*, No. 90-1014; Brief for the United States as Amicus Curiae Supporting Petitioners at 19 n.18, *Weisman*, No. 90-1014.

274. Brief for the Petitioners at 24, *Weisman*, No. 90-1014; Brief for the United States as Amicus Curiae Supporting Petitioners at 17-18, *Weisman*, No. 90-1014.

275. See *supra* Part IV.B; see also Respondent's Brief at 36-37, *Weisman*, No. 90-1014. A review of history shows that "Americans of the founding generation actually debated and voted on the question whether government could endorse religion if it did so noncoercively. The answer was no." Respondent's Brief at 37, *Weisman*, No. 90-1014.

276. See *supra* Part IV.A.

277. Respondent's Brief at 44-47, *Weisman*, No. 90-1014. Even Professor McConnell, who propounded the "no coercion" argument, agrees that school prayers impose "indirect coercive pressure upon religious minorities to conform to the prevailing . . . religion . . ." McConnell, *supra* note 224, at 935 (quoting *Engel v. Vitale*, 370 U.S. 421, 430-31 (1962)).

religion thereby discriminates against minority religions and nonbelievers.<sup>278</sup>

The respondent in *Weisman* applies O'Connor's "no endorsement" analysis to the case.<sup>279</sup> He argues that the school prayers entangle government with religion,<sup>280</sup> and that they have both the purpose and effect of endorsing religion.<sup>281</sup> Thus, the prayers in *Weisman* would not survive O'Connor's "no endorsement" analysis.

### Conclusion

Chief Justice Rehnquist has historically been unreceptive toward O'Connor's "no endorsement" interpretation of the Establishment Clause. Instead, Rehnquist has favored his "no preference" construction, which incorporates an accommodationist stance. However, he has never convinced a majority of the Court to apply his "no preference" test.

In *Board of Education v. Mergens*,<sup>282</sup> Rehnquist joined an opinion which applied O'Connor's "no endorsement" analysis. O'Connor's position on the Establishment Clause presents a viable compromise between the accommodationist and separationist camps. From the history that is available, her view appears to be more faithful to the "original intent" of the Framers of the First Amendment, than is the "no preference" view. O'Connor's view also protects the religious liberty of minority religions, and the nonreligious, while Rehnquist's "no preference" test does not.

The Court has now been asked either to disallow a "nonpreferential" establishment by applying O'Connor's "no endorsement" test, or to allow the establishment by adopting a "no coercion" test.<sup>283</sup> If Rehnquist forsakes his "nonpreferentialist" view in favor of O'Connor's "no endorsement" test, he will be acting in accordance with the judicial philosophy that he told the members of the Senate Judiciary Committee they should look for in a nominee to the Supreme Court.<sup>284</sup>

---

278. See *supra* Part IV.C.

279. Respondent's Brief at 22, *Weisman*, No. 90-1014.

280. *Id.* at 31-32.

281. *Id.* at 24-30.

282. 110 S. Ct. 2356, 2370-73 (1990).

283. Compare Brief for the Petitioners at 14-44, *Weisman*, No. 90-1014 with Respondent's Brief at 24-32, 36-37, *Weisman*, No. 90-1014.

284. See *supra* notes 2-5 and accompanying text.



